MASSACHUSETTS
40 main st, suite 301
florence, ma 01062
tel 413.585.1533
fax 413.585.8904

WASHINGTON
501 third street nw, suite 875
washington, dc 20001
tel 202.265.1490
fax 202.265.1489

freepress
www.freepress.net

December 16, 2010

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Via Electronic Filing

Re: Notice of *Ex Parte* Presentations in MB Docket 10-56, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licensees*

Dear Ms. Dortch,

Pursuant to section 1.1206(b) of the Commission's rules, this notice is being submitted pursuant to two *ex parte* communications in MB Docket 10-56, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*.

On December 15, 2010, Andrew Jay Schwartzman of Media Access Project, Parul Desai of Consumers Union, and Corie Wright of Free Press met with Joshua Cinelli, Media Advisor to Commissioner Michael Copps.

Later that same day Mr. Schwartzman, Ms. Desai, and Ms. Wright, joined by Tyrone Brown of Media Access Project and John Bergmayer of Public Knowledge, met with Rick Kaplan, Chief Counsel and Senior Legal Advisor to Chairman Genachowski, and John Flynn, Senior Counsel to the Chairman for Transactions.

In both meetings, representatives from the public interest groups made the following points:

The public interest groups reiterated their opposition to the proposed acquisition of NBC-Universal by Comcast Corp. They emphasized that under the Communications Act, merger applicants must show that the merger would enhance – rather than merely preserve the *status quo* – with regard to the public interest goals of competition, diversity and localism. In other words, even if Comcast and NBCU could demonstrate that the proposed transaction would be competitively "neutral," it still would be *insufficient* to warrant Commission approval. Comcast and NBCU have failed to meet this burden. The merger of the largest cable operator and one of the nation's premier video content producers will fundamentally alter the structure of the video marketplace to the detriment of competition, innovation, and diversity in MVPD and programming markets, the emerging online video market, and local media markets.

Promoting Competition and Choice in Online Video Programming Markets

Record evidence makes clear that the emerging market for online video, while nascent, holds the potential for substantial growth and poses a direct competitive threat to large cable operators such as Comcast. Comcast in turn has embarked on an aggressive campaign to ensure that online video never becomes a viable, direct competitor to its facilities-based MVPD or Fancast Xfinity TV services. In buying control of NBCU, Comcast seeks to acquire a stable of popular broadcast, cable, and feature film content which it can then withhold from online competitors that threaten to erode Comcast's sizable market power. As a stand alone programmer, NBCU has incentives to make its content more widely available online. However, as a Comcast subsidiary, it would have an incentive to withhold its programming from providers that compete with Comcast's own online video and traditional cable offerings. Moreover, the public interest groups stressed that the practices of "windowing" [1] and "authentication" could be used by the joint venture to unfairly limit online distributors' access to Comcast/NBCU-controlled programming.

The public interest groups further explained that the term "authentication," which has been coined by the cable industry, is something of a misnomer. It is far more akin to a tying arrangement. Specifically, "authentication" is the practice of making a cable subscription mandatory to view online content. This prevents consumers from "cutting the cord" and forces emerging online video distributors into a complementary role, instead of as a competitive substitute to cable television. By requiring authentication as a condition of access to Comcast/NBCU content, the joint venture can hobble true online video competition and extend the cable model (and price structure) to the internet.

To prevent the joint venture from engaging in such anticompetitive tactics, Comcast and NBCU should be prohibited from withholding from, or exacting unfair or unreasonable rates, terms or conditions on, competing online video programming distributors (OVPDs) seeking access to content and associated capabilities controlled by or affiliated with the joint venture. Specifically, the FCC should prohibit the joint venture from: (1) Requiring, as a condition of access to Comcast/NBCU affiliated content, an OVPD to authenticate that its customers also subscribe to an MVPD service; (2) Limiting access to episodic content to only those OVPDs that also provide linear programming streams, or require that OVPD viewers authenticate that they subscribe to linear programming streams; (3) Preventing, or causing others to prevent, Comcast/NBCU affiliated content from being accessed based on browser or device;[2] (4) Prescribing temporal "windows" for the availability of Comcast/NBCU-affiliated content to OVPDs that exceed the joint

[1] "Windows" or "windowing" refers to the practice of delaying the availability of programming to alternative platforms for a period of time following the "first run" of content.

[2] About two months before Comcast announced its proposed merger with NBCU, Hulu, a video Web service co-owned by NBC, intentionally blocked the ability of Boxee media center to replay Hulu videos. Boxee essentially functions like a web browser that allows consumers to view online video via their television screens. Hulu's management reported that the blocking was conducted at the behest of NBC.

venture's own windowing practices for making affiliated content available through Comcast's cable OnDemand or online Fancast Xfinity TV services.

The public interest groups also explained that Comcast can complement its ability to withhold its own content by using its position as the dominant cable operator to pressure unaffiliated programmers into exclusive deals that prevent them from making their content available to Comcast's online-only competitors. Comcast is the largest cable provider in the nation, and is the dominant MVPD in certain regions of the country. Because programmers rely on Comcast for the largest percentage of their MVPD subscriber fees, Comcast has tremendous capacity to force programmers to limit online distribution of content.

To ensure a modicum of protection for independent programmers to make their own choices about how and who to sell their content without fear of retaliation from Comcast, the FCC must prevent the joint venture from strong arming independent programmers into restricting the availability of their video content to competing video programming distributors on reasonable and non-discriminatory terms. To this end, the FCC should prohibit the joint venture from: (1) Entering into exclusive arrangements, or enforce current exclusive arrangements, that prevent unaffiliated content providers from making their content available to the competing video platforms of OVPDs; (2) Prescribing, as a condition as a condition of carriage on Comcast's cable or online video platforms, that unaffiliated programmers may only make their content available to OVPDs that authenticate that their customers also subscribe to an MVPD service; (3) Prescribing, as a condition of carriage on Comcast's cable or online video platforms, "windows" for the distribution of unaffiliated content on competing online video services that exceed the joint venture's own windowing practices for making content available through Comcast's cable OnDemand or on Fancast Xfinity TV services.

The public interest groups also repeated concerns made in previous filings[3] that Comcast has failed to comply with the FCC's First Information Request, issued in May 2010, which among other things requested:

> [A]ll agreements currently in effect and all agreements executed since January 1, 2006 that the Company has entered into with any provider of Video Programming which discuss cable network carriage, retransmission consent, program carriage, and distribution rights for Video Programming.[4]

Comcast's non-compliance with the FCC's request is non-trivial. Without access to such contracts it is impossible to determine the exact extent to which Comcast limits programmers' ability to distribute their content via the internet, and leaves the Commission and the public with an incomplete record on which to base decisions

---

[3] *See Reply to Opposition to Petitions to Deny of Free Press, Media Access Project, Consumers Union, and Consumer Federation of America*, filed MB Dkt 10-56 (Aug. 19, 2010) at 17-18; *See also Notice of Ex Parte Communication of Free Press and Media Access Project*, filed MB Dkt 10-56 (Nov. 18, 2010).

[4] Federal Communications Commission, *Request for Information Sent to Comcast Corporation*, MB Dkt 10-56 (May 21, 2010) at Question 44.

regarding Comcast's anticompetitive practices. Consequently, public interest urge the Commission to secure these contracts for review without delay.

Finally, even assuming that some content "escapes" to competing online distributors, Comcast could still use its bottleneck control over broadband service to enhance access to affiliated content and services, while degrading access to those which compete with NBCU programming and platforms. Post-merger Comcast would be the only company that controls large amounts of content, cable operations, and access to broadband services. As such, it would be uniquely positioned with both the incentive and capacity to discriminate against competing online video providers. Without *bona fide* open internet protections, consumers and new online services will remain vulnerable from these anticompetitive tactics.

Enhancing Localism and Diversity in Local Media Markets

The public interest groups emphasized that the Applicants' "voluntary" promise to collectively provide an additional 1,000 hours per year of local programming for the NBC owned and operated stations is minor, dubious, and unenforceable. Indeed, the total commitment only adds up an additional 16 minutes per day, per NBC O&O station (assuming that such programming is evenly distributed among the stations). While any increase in local programming is welcome, sixteen minutes a day is a trifle given the scope of the merger and the resources of the merging parties. The groups also noted that it is unacceptable that Applicants have made no promise to invest in local programming for Telemundo owned and operated stations.

Furthermore, the groups pointed out that Comcast and NBCU have not clearly explained what they mean by local programming. There is no commitment that this programming will be locally-originated or will touch upon local news and public affairs. Moreover, neither the Commission nor the public can monitor or enforce this commitment under the terms Applicants have proposed.

The broadcast stations controlled by the joint venture should commit to better serving their communities through meaningful and enforceable local programming requirements. To enhance and enforce the joint venture's commitment to NBC stations, and to remedy its second class treatment of Telemundo stations and audiences, the FCC should require the joint venture to: (1) Establish (on a per station basis) the threshold level of locally-originating programming provided pre-merger on each owned and operated station. on Each Comcast/NBCU owned broadcast television station must increase the amount of locally-originating local news and public affairs programming by at least one hour per day; (2) The stations should fulfill this commitment through the provision of locally-originating programming that focuses on *bona fide* news, electoral, and public affairs programming. Programming that is produced as a consequence of a Local News Sharing Agreement or Local Marketing Agreement should not count towards thisrequirement; (3) Each owned and operated station must report quarterly on the type and amount of local programming offered via FCC Form 355.[5] The reports must be publicly submitted to the Commission, made available in station public files, as well as posted on individual station websites so that the FCC and the public can ensure compliance.

Finally, as a point of process, the public interest groups described the difficulty faced by those opposed to the transaction because of their inability to discern the nature of discussions between the applicants and Commission staff. They asked that the Commission publish any proposed conditions and solicit public comment on them.

In accordance with the Commission's rules, this *ex parte* notice is being filed electronically in the above referenced docket. If you have any questions regarding this filing, please do not hesitate to contact me.

Respectfully submitted,
______/s/___________

Corie Wright
Free Press,
Washington, D.C.
202-265-1490
cwright@freepress

[5] Form 355 was adopted pursuant a 2007 Commission order, but has yet to be implemented industry-wide as a consequence of pending petitions for reconsideration and approval by the Office of Management and budget. *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Report and Order, 23 FCC Rcd 1274 (2007). That the Commission has not yet required industry-wide adoption of this form does not preclude the FCC from utilizing the form as an enforcement mechanism in this transaction.